MARIESOSELA ANTHONY v. KERAJAAN MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AKHTAR TAHIR J
[SUMMONS NO: WA-21NCVC-24-05-2019]
23 DECEMBER 2020

TORT: *Negligence – Medical negligence – Duty of care – Breach of – Claimant admitted to hospital and moved from intensive care unit to normal ward – Claimant placed on bed without railing and later fell over – Medical officer on duty not informed – Claimant suffered from cardiac arrest and medical attention came late – Whether duty of care established – Whether there was breach of duty of care*

TORT: *Negligence – Medical negligence – Damages – Claim for – Claimant admitted to hospital and moved from intensive care unit to normal ward – Claimant placed on bed without railing and later fell over and suffered from cardiac arrest – Whether medical negligence established – Whether claimant entitled to damages*

TORT: *Negligence – Medical negligence – Vicarious liability – Claimant admitted to hospital and moved from intensive care unit to normal ward – Claimant placed on bed without railing and later fell over – Medical officer on duty not informed – Claimant suffered from cardiac arrest and medical attention came late – Vicarious liability of Government of Malaysia as employer of medical personnel involved*

The plaintiff was admitted to General Hospital Kuala Lumpur ('GHKL') and moved to the intensive care unit ('ICU') due to pneumonia and respiratory problems. Following a tracheostomy surgery, the plaintiff remained in ICU before being transferred to a normal ward at 2am, on 25 March 2018, as the ICU was short of beds. At the normal ward, she was placed on a bed without railing because (i) since she was in a state of coma, the plaintiff could not move and there was no danger that she would roll over; and (ii) there were no beds with railing available. Later, the plaintiff was found to have fallen from her bed at 2.45am. The medical personnel putting the plaintiff back on the bed examined the plaintiff and found all the readings to be normal. This being the case, no assistance was sought for the plaintiff to be examined by any other senior medical personnel on duty at the ward. The plaintiff suffered a cardiac arrest at 6.30am and the medical officer on duty, the second defendant, only arrived ten minutes later. The plaintiff was transferred to the ICU again and was diagnosed to suffer from severe cortical dysfunction and hypoxic ischemic encephalopathy. The plaintiff was later discharged from GHKL by her family to another hospital and was finally brought home for after care. The plaintiff, through her husband, claimed against the second, fourth, fifth and sixth defendants, the medical personnel of GHKL on duty, for medical negligence resulting in the medical condition the plaintiff was suffering from now. The plaintiff did not proceed against the third and seventh defendants as, although they were listed to be on duty at the normal ward, they were actually not. The Government of Malaysia ('the first

defendant') was added as a party for being vicariously liable for the negligence of its employees. The issues revolved around the events from the time the plaintiff was transferred from the ICU, on 25 March 2018, to the normal ward and the event in the normal ward from the time the plaintiff fell from the bed until she suffered a cardiac arrest at 6.30am.

Held (allowing claim; awarding special, general and aggravated damages):

(1) Duty of care arises out of a relationship established between the parties. The relationship of the plaintiff and the defendants was established at the point of time the plaintiff was admitted to GHKL and subsequently transferred to the normal ward in which the defendants were the medical personnel on duty. The directive to transfer the plaintiff, from the ICU to the normal ward, was regular and proper. However, the fact that the directive was given at 6pm and was only carried out in the early hours of the morning, was improper. A medical doctor should have assessed whether the plaintiff was fit for transfer and this was not done. This was a breach of duty of care by the sixth defendant following the normal standard of care required under such a situation, especially since the sixth defendant, who was responsible to carry out the transfer, had detected some instability of the plaintiff on transfer. (paras 12, 20, 21 & 22)

(2) The events that transpired showed that a bed with a railing was necessary in the case of the plaintiff as, shortly after, the plaintiff fell off the bed. The non-providing of a bed with a railing was a breach of duty on the part of the medical personnel on duty at the ward. The risk of putting the plaintiff on a bed without a railing was clearly foreseeable since the medical personnel had noticed the plaintiff slipping down a number of times. Such bed not being available could not be a reason to deprive the plaintiff with one. (paras 26-27)

(3) The second defendant admitted that he was not informed of the fall and added that, ordinarily, he should have been informed. The necessity to inform the medical officer became more pertinent given the fact that the plaintiff did suffer some distress after the fall. What amounted to a breach of duty of care in this situation was failing to inform the medical officer on duty so that the plaintiff could have been re-examined and be given further medical attention. The failure to inform the medical officer was not only a breach but an intentional attempt to conceal the fall. (paras 28, 29 & 32)

(4) The plaintiff was in the ICU for a number of days and, although she was not conscious, nothing untoward happened to her at the ICU; she was stable. The actual problem only started when she was transferred to the normal ward when her condition was unstable but no attempt was made to allow a medical officer to examine her. The problem was further

compounded by the fact that the plaintiff was placed on a bed without a railing causing her to fall from the bed. This worsened her condition but, again, no attempt was made to get her to be examined by a senior medical doctor. The straw that broke the camel's back was when the plaintiff suffered a cardiac arrest most probably as an after effect of the fall. Although she was examined by a medical doctor, there was lack of proper medical aid given to the plaintiff. The above facts were interconnected and it was this series of events, coupled with the breach of duty on the part of the medical personnel, which directly caused the plaintiff to suffer brain damage. In short, the damages suffered by the plaintiff was as a direct result of the negligence of the team of medical personnel assigned to her from the time she was transferred from the ICU to the normal ward and at the ward itself. (paras 40-45)

(5) The defendants were 100% liable. The defendants were Government employees attached to GHKL and, therefore, under the employment of the first defendant. The first defendant was vicariously liable for the negligence of the defendants. In assessing damages, the court took into account that the plaintiff was not a healthy person in the first place. Some of the losses suffered by the plaintiff would still be incurred by the plaintiff's family, regardless of the negligence of the defendants. The plaintiff was entitled to special, general and exemplary/aggravated damages. (paras 48, 49, 51 & 63)

Case(s) referred to:

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(refd)***
R Bateman [1925] 94 LBKB 79 ***(refd)***
Wagon Mound (No 2) [1966] 2 All ER 709 ***(refd)***
Zulhasnimar Hasan Basri & Anor v. Dr Kuppu Velumani P & Ors [2017] 8 CLJ 605 FC ***(refd)***

For the plaintiff - Dhillon & KB Karthi; M/s P S Ranjan & Co
For the defendants - Mohd Izham Mohd Marzuki; AG's Chambers

Reported by Najib Tamby

JUDGMENT

Akhtar Tahir J:

Introduction

[1] The plaintiff's claim against the defendants is for medical negligence perpetrated by the medical officers and staff ("medical personnel") of the General Hospital Kuala Lumpur ("GHKL") resulting in the medical condition the plaintiff is suffering now.

[2] The plaintiff has commenced this action through her husband against all those medical personnel on duty in the ward in which the plaintiff was being treated. The Government of Malaysia is added as a party for being vicariously liable for the negligence of its employees.

The Brief Facts

[3] The plaintiff was admitted to GHKL on 6 February 2018 and moved to the intensive care unit ("ICU") on 8 February 2018 after suffering from pneumonia and respiratory problems. On 12 March 2018 a tracheostomy surgery was done on her. The plaintiff remained in ICU until 24 March 2018.

[4] On 24 March 2018 at 6.30pm, a direction was given to transfer the plaintiff to ward 23 which was a normal ward. The plaintiff was transferred to ward 23 at 2am, 25 March 2018.

[5] On the same day at 2.45am, the plaintiff was found to have fallen from her bed and at 6.30am the plaintiff suffered a cardiac arrest.

[6] The plaintiff was then transferred to the ICU and on 11 April 2018 the plaintiff was diagnosed to suffer from sever cortical dysfunction and on 17 April 2018 the plaintiff was diagnosed to suffer from hypoxic ischemic encephalopathy.

[7] The plaintiff was later discharged from GHKL by her family members to the Tawakkal Health Center and was finally brought to her home for after care.

The Issues

[8] In this case, the issues revolve around the events from the time the plaintiff was transferred from the ICU on 25 March 2018 to ward 23 and the event in ward 23 from the time plaintiff fell from the bed until she suffered cardiac arrest at 6.30am on the same day.

[9] The plaintiff conceded that two of the defendants named in this case namely the third and the seventh defendants were not on duty at ward 23 although they were listed to be on duty from the information received by the plaintiff. The plaintiff therefore did not proceed against these two defendants.

[10] Against the other defendants the court has the duty to determine whether the defendants were negligent in carrying out their duties leading to the damage suffered by the plaintiff. If the defendants are found negligent then the court has to assess the damages suffered by the plaintiff and compensate the plaintiff for the losses suffered. In short, the court has to determine liability and damages.

Liability

[11] In deciding on liability the court has to ascertain whether there was a duty of care, whether there was breach the duty care according to the standard of the duty of care required by the defendants leading the plaintiff to suffer from the present medical condition.

Duty Of Care

[12] It is clear from various authorities that duty of care arises out of a relationship established between the parties. In this case the relationship of the plaintiff and the defendants was established at the point of time the plaintiff was admitted to GHKL and subsequently transferred to the ward 23 of GHKL in which the defendants were the medical personnel on duty.

[13] Once this relationship has been established, the nature of the duty of care has been aptly described by Lord Hewart CJ in *R Bateman* [1925] 94 LBKB 79 to be as follows:

> If a person holds himself out possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward.

Standard Of Care

[14] A full discussion on the standard of duty of care in a medical negligence case has been undertaken in the Federal Court case of *Zulhasnimar Hasan Basri & Anor v. Dr Kuppu Velumani P & Ors* [2017] 8 CLJ 605. It is therefore unnecessary to repeat it here.

[15] What can be gleaned from the above decision is that a determination of a standard of care is dependent on the finding of facts. A trial court therefore has to first make a finding of fact on the issues raised.

[16] If the finding of fact shows that a certain skill, competence or expertise is required in either handling or treating the patient then the standard of duty of care as stated by in a direction to the jury given by McNair J in *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118, is applicable where he said:

> But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.

A ...

A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that medical act ... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such practice, merely because there is a body of opinion that takes a contrary view.

B

[17] However, in this court's view if the handling of the patient in certain situation does not require any special skill or expertise, then the standard of care of a reasonable person, ie, the man on top of a Clapham omnibus can be applied using the ordinary test of foreseeability as expounded in the

C *Wagon Mound (No 2)* [1966] 2 All ER 709.

[18] In *Wagon Mound*'s case (*supra*) it was stated as follows that a reasonable foreseeable risk of damage is "one which would occur in the mind of a reasonable man in the position of the defendant's servant which he would not brush aside as far-fetched".

D

Breach Of Duty Of Care

[19] It is in the light of the above standard of care that the court needs to determine whether there was a breach of duty of care in this case.

E **[20]** In this case it is noted that the plaintiff was in the ICU but was directed to be shifted to the ordinary ward as the ICU was short of bed. The directive to transfer to ordinary ward is an accepted medical practice in the GHKL. Therefore in the court's view the directive of the transfer of the plaintiff was regular and proper.

F **[21]** What was improper however was the fact that the directive which was given at 6pm was only carried out in the early hours of the morning. Under this circumstance the court accepts the evidence of the defendants' expert witness (SD4) that a medical doctor should have assessed whether the plaintiff was fit for transfer.

G **[22]** This was not done in this case and the court viewed this as a breach of duty of care by the sixth defendant following the normal standard of care required under such a situation, especially since the sixth defendant who was responsible to carry out the transfer, had detected some instability on the condition of the plaintiff on transfer.

H **[23]** Even following the reasonable men test of standard of care the sixth defendant should have been alert to the lapse of the number of hours between the directive of transfer and the actual transfer to have the presence of mind to refer the matter to a medical officer. She cannot carry out instructions mechanically, just as to complete her task.

I **[24]** When the plaintiff was moved to the ordinary ward she was placed on a bed without railing. The reasons given for placing the plaintiff on a bed without a railing was because the medical personnel on duty at the ward

believed that since the plaintiff was in a state of coma she could not move and therefore no danger she would roll over. The other reason given was that here were no beds with railing available at that point of time.

[25] The evidence led in this case is not clear as to whether the plaintiff required a bed with railing, but looking at the evidence of the medical personnel the indication seems to be that, the plaintiff required a bed with railing and in fact they had tried to find one. Since none was available a bed without railing was used.

[26] However, the events which transpired later showed that a bed with railing was necessary in the case of the plaintiff, as shortly after, the plaintiff fell off the bed. The court views the non-providing of a bed with railing was a breach of duty of care on the part of the medical personnel on duty at the ward.

[27] The risk of putting the plaintiff on a bed without railing is clearly foreseeable, even using the foreseeability test of a reasonable man especially since the medical personnel on duty had noticed the plaintiff slipping down a number of times. Such beds not being available cannot be a reason to deprive the plaintiff with such a bed.

[28] After the plaintiff had fallen off the bed, the medical personnel putting the plaintiff back on the bed, examined the plaintiff and found all the readings to be normal. This being the case, no assistance was sought for the plaintiff to be examined by any other senior medical personnel on duty at the ward. The second defendant who was the medical officer on duty admitted he was not informed of the fall and added that ordinarily he should have been informed.

[29] The necessity to inform the medical officer became more pertinent given the fact that the plaintiff did suffer some distress after the fall. From the evidence given even by the defendants themselves, especially those on duty at the time of the fall, it is clear that the oxygen level given to the plaintiff was increased to 40% at 8 liters per minute.

[30] There were discrepancies in the medical notes whether the level of oxygen was increased, the court however finds that in all probability the level of oxygen was increased based on the answers given by the defendants during their testimony.

[31] Putting aside the evidence of the increase of the oxygen administered to the plaintiff, the court takes the stand that even a healthy person can suffer some distress falling from a bed and more so a person in a condition of the plaintiff. Again, the foreseeability test of a reasonable person is applicable.

[32] What amounted to a breach of duty of care in this situation was failing to inform the medical officer on duty so that the plaintiff could have been re-examined and be given further medical attention. This breach was caused

by the two nurses and the house officer on duty. The failure to inform the medical officer in the court's view is not only a breach but an intentional attempt to conceal the fall.

[33] Later in the early part of the morning the plaintiff suffered a cardiac arrest which needed a cardiopulmonary resuscitation ("CPR"). There was uncertainty as to what time the plaintiff suffered the cardiac arrest as the medical notes differed on the timing stating it at 6am, 6.15am and 6.30am. Regardless of the time, one thing is clear that the medical officer on duty, the second defendant arrived after ten minutes. It is also not disputed that no specialist were summoned to assist in the CPR.

[34] On the CPR the court accepted the evidence that a most important aspect is jump-starting the heart with intravenous adrenaline and this should be done immediately without delay. In this case the evidence showed that administering of the adrenaline was only done after the arrival of the second defendant ten minutes later.

[35] The court accepts the evidence of SD4 that the administering of adrenaline ten minutes later is unacceptable as the ten minutes delay can cause the patient to suffer brain damage.

[36] Taking into consideration all the above evidence it can be concluded conclusively in this case that there were a number of instances of breaches of the standard duty of care by the defendants tending the plaintiff.

Causation

[37] The question to be addressed next is did the breaches of duty of care on the part of the medical personnel cause the plaintiff to suffer the medical condition she is in now?

[38] The defendants contend that the plaintiff's fall from the bed did not cause the plaintiff to suffer her present medical condition. This contention is based on the fact that there was a long lapse of time between the times the plaintiff fell from the bed to suffering from the cardiac arrest.

[39] According to the defendants, the cardiac arrest was the main cause of the brain damage suffered by the plaintiff. It is to be noted that there was a gap of four to five hours between the fall and the time when the plaintiff suffered the cardiac arrest.

[40] However in the court's view, the events befalling the plaintiff has to be looked in its entirety. The plaintiff was in the ICU for a number of days and although she was not conscious nothing untoward happened to her at the ICU. In other words, the plaintiff's condition was stable in the ICU.

[41] The actual problem only started when she was transferred to the normal ward when her condition was unstable but no attempt was made to allow a medical officer to examine her.

[42] The problem was further compounded by the fact that the plaintiff was placed on a bed without a railing causing her to fall from the bed. This worsened her condition but again no attempt was made to get her to be examined by a senior medical doctor.

[43] The straw that broke the camel's back is when the plaintiff suffered a cardiac arrest most probably as an after effect of the fall. Although she was examined by a medical doctor there was again a lack of proper medical aid given to the plaintiff.

[44] All this facts are interconnected and the court makes the finding that it was this series of events coupled with the breach of duty on the part of the medical personnel which directly caused the plaintiff to suffer the brain damage.

[45] In short, the damages suffered by the plaintiff was a direct result of the negligence of the team of medical personnel assigned to her from the time she was transferred from the ICU to ward 23 and at ward 23 itself.

[46] A further point to be noted here is that there were a number of discrepancies in the medical notes prepared by the medical personnel on duty which were admitted by the medical personnel themselves. The excuse given for such discrepancies was the pressure of their working long hours and under stress.

[47] This discrepancies might not have caused the injuries suffered by the plaintiff but is something which cannot be ignored. The importance of the medical notes cannot be downplayed as it might cause serious repercussions. In this case, the increase in the oxygen level required by the plaintiff was an early alert indicator that something was not right.

Vicarious Liability

[48] In this case all the defendants were Government employees attached to GHKl and therefore under the employment of the Government of Malaysia. Vicarious liability of the first defendant was never a dispute in this case. In short, the first defendant is vicariously liable for the negligence of the defendants in this case.

Damages

[49] For the negligence caused by the defendants the plaintiff is entitled to damages to wit special, general and also exemplary/aggravated damages. However, in assessing damages in this case the court has to take account of the fact that the plaintiff was not a healthy person in the first place.

[50] The plaintiff was already lying motionless at the ICU for a good number of days. However, her condition deteriorated due to the negligence of the defendants.

[51] In short, it can be deduced that some of the losses suffered by the plaintiff would still be incurred by the plaintiff's family, regardless of the negligence of the defendants.

Special Damages

[52] The court only allowed the special damages which were supported by proof of payment and many of these items were conceded to by the plaintiff. All those items of special damages which were suffered by the plaintiff but which would have been incurred by the plaintiff regardless of the negligence of the defendants were disallowed.

[53] The special damages allowed are as follows:

(i) Hospital and medical expenses: RM71,183.55 + RM4,110.85 (pre-trial damages).

(ii) Cost of diapers, wipes and other necessities: RM20,839.47 + RM13,600 (pre-trial damages).

(iii) Cost of nursing or caregiving services: RM6,700 per month (January 2019 – August 2020).

(iv) Cost of ambulance services: RM1,640 + RM2,760 (pre-trial damages).

(v) Cost of a hospital bed, a hospital bed mattress and a ripple mattress: RM2,500.

(vi) Cost of obtaining an order for discovery of medical records: RM300.

General Damages

[54] In determining general damages it was pertinent to determine the multiplication period based on the expected life span of the plaintiff. After taking into account the evidence that in her condition the plaintiff's normal life span would be five years but could extend in cases of proper care for ten years.

[55] In considering the evidence of the expert the court found the evidence leaned more towards the life span of five years in the case of the plaintiff. After considering the medical condition of the plaintiff the court found that the life span of five years should be accepted. Taking into account contingencies a final multiplication period of four years would be appropriate in this case.

Pain And Suffering

[56] For pain and suffering and the loss of amenities of life for the plaintiff: RM300,000.

Future General Damages

[57] For future general damages the court disallowed those damages claimed by the plaintiff that would have been incurred by the plaintiffs regardless of the negligence of the defendants.

[58] The court also disallowed those future expenses that had been recommended by the expert called by the plaintiff simply because they could not be carried out at the place the plaintiff was staying. The apartment of the plaintiff was limited in size and was on the first floor and therefore impractical for some of the equipment recommended by the expert. It was the plaintiff's family choice not to move out of the apartment.

[59] The family was also reluctant to allow the plaintiff to stay in a special nursing hospital as it would be too costly. The court also deemed it unnecessary to allow the plaintiff to be put in a special nursing care because of the high cost and the restrictions that would be faced by the plaintiff's family to keep a tab of the plaintiff's progress.

[60] Taking into consideration the above factors the court allowed the following general damages:

(i) Alternating pressure mattress: agree with the defendant RM10,000 (for one unit) (five years lifespan).

(ii) Tilt in space wheelchair with head support and body straps: RM12,000 (for one unit).

(iii) Tilt in space commode/shower chair: agree with the defendant RM12,000 (for one unit) (five years lifespan).

(iv) Electric hoist: RM12,000 (for one unit) (ten years lifespan).

(v) Orthotic devices (upper and lower limbs): agree with the defendant RM4,500 (for three units) (two years lifespan).

(vi) Cost of diapers, wipes and other necessities: RM1,000 x 48 months.

(vii) Nutritional care: RM500 x 48 months.

(viii) PEG tube replacement: agree with the defendant RM1,600 (for 2 units) (1-2 years lifespan).

(ix) Tracheostomy tube replacement: RM700 x 2 x 4 years (six months lifespan).

(x) Home enriching environment: agree with the defendant RM10,000.

(xi) Physiotherapy (once a week for the first six months and thereafter once a month): (RM200 x 24 weeks) + (RM200 x 54 months).

(xii) Occupational therapy (once a week for the first six months and thereafter once a month): (RM200 x 24 weeks) + (RM200 x 54 months).

A (xiii) Cost of nursing care: RM6,700 x 48 months.

(xiv) Ambulance service: RM400 x 6 times a year x four years.

Exemplary/Aggravated Damages

[61] In this case there were severe instances of dereliction of duty on the
B part of the defendants which caused an irreparable damage to the plaintiff. This was therefore a fit case to award exemplary/aggravated damages and the court allowed aggravated damages of RM200,000.

[62] Finally, the court allowed a costs of RM150,000 and interest as
C claimed by the plaintiff on all the head of damages.

Conclusion

[63] In conclusion, the court allowed the plaintiff's claim on the finding of 100% liability on the part of the defendants and awarded the plaintiff with special, general damages and aggravated damages with costs and interest.

D

E

F

G

H

I